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SESSION ID: LAW-M06

How to How to Navigate Cybersecurity Regulations in a Post-Chevron World

MODERATOR: **Ari Schwartz**
Managing Director of Cybersecurity Services, Venable LLP

PANELISTS: **Jamil Jaffer**
Venture Partner
Paladin Capital Group

Raj De
Leader of the Global Cybersecurity & Data Privacy Practice and National Security Practice
Mayer Brown

Wei Chen
Chief Legal Officer; EVP, Government Affairs
Infoblox

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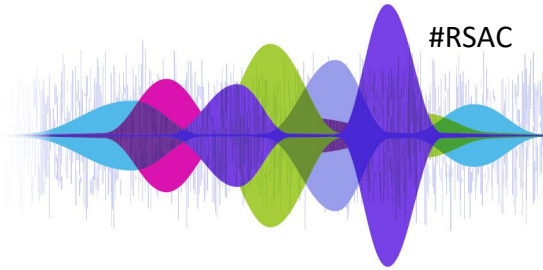

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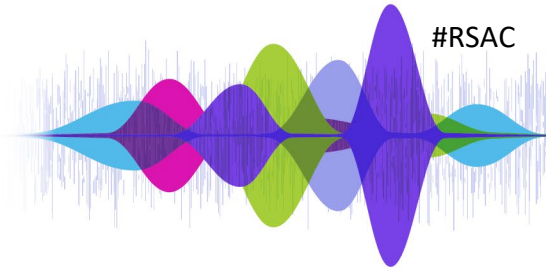
Overview



- A Brief Overview of Administrative Law and Cybersecurity Regulation
- The Law Before *Loper-Bright*
- *Loper-Bright* and the New Legal Landscape
- Assessing Regulatory Challenges
- Applying Lessons Learned

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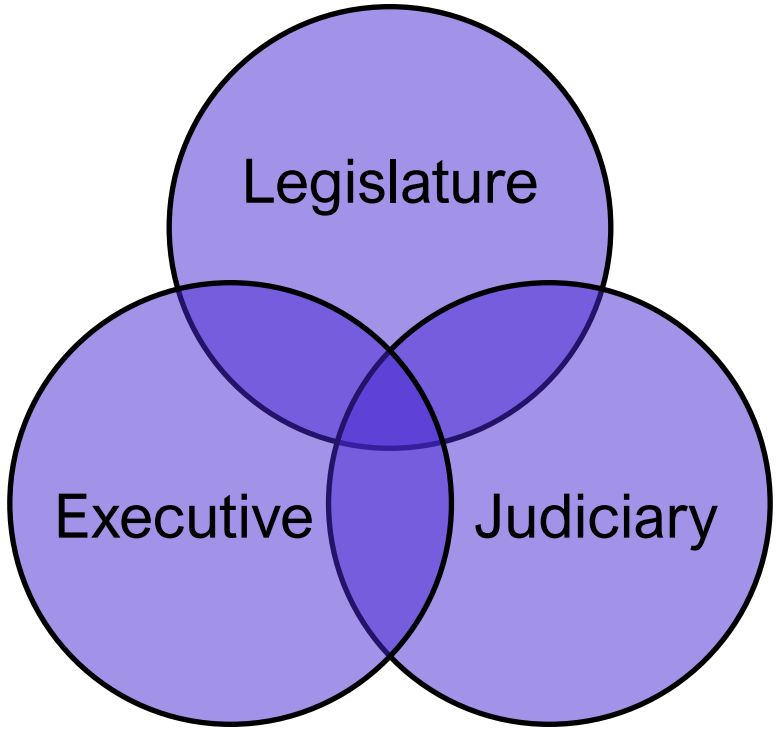
A Brief Overview of Administrative Law and Cybersecurity Regulation

Three Overlapping Branches of Government

- Article I, Section 1: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

- Article II, Section 1: The executive Power shall be vested in a President of the United States of America.

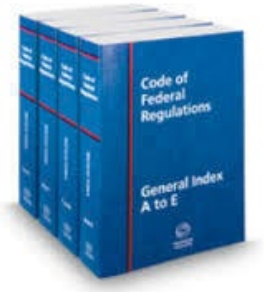


- Article III, Section 1: The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Regulatory Challenges

Congress imposes legal requirements and prohibitions by statute.

Congress frequently authorizes federal regulatory agencies to issue rules to implement these statutes.



Federal regulators issue regulations through a rulemaking process under the Administrative Procedure Act.

In doing so, federal regulators interpret the statutes that they implement.

Courts hear legal challenges to regulations.

When a plaintiff challenges a rule, courts consider whether the regulatory agency correctly interpreted the statute that they were implementing.

Cybersecurity Regulatory Landscape

- Origins in privacy, now adapting to system security
  - Cyber threats have evolved (e.g., ransomware, AI)

- Limited cybersecurity-specific federal legislation
  - Sector patchwork
  - Financial sector among the more regulated

- As a result: Agencies making creative use of older statutes
  - Often related to privacy, safety, and consumer protection

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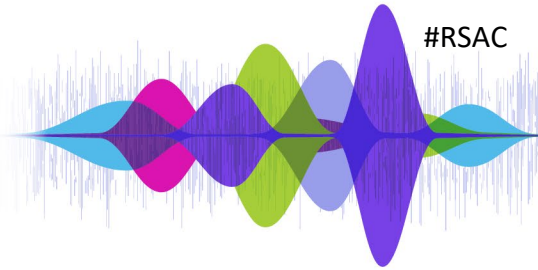
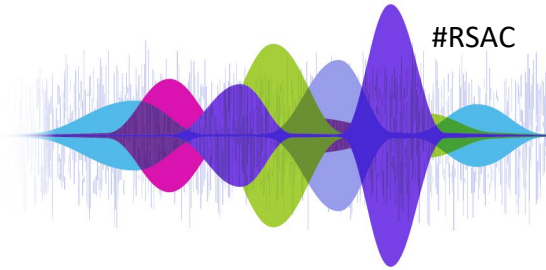
The Law Before *Loper-Bright*

Early Challenges to Agency Actions



- *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)
  - To be valid, agency rules must be based on explicit or implicit Congressional authority, and courts will sustain Congress' delegations of authority if Congress provides an "Intelligible Principle" to which the agency must conform
- *A. L. A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935)
  - Congress cannot grant the executive branch unfettered discretion in developing codes of conduct, but instead must set standards and limits in the scope of authority
- *Yakus v. United States*, 321 U.S. 414 (1944)
  - The doctrine of separation of powers does not prevent Congress from granting an agency the ability to use its own judgment

Chevron: A Finger on the Scale for Regulators



- Under *Chevron*, courts deferred to an agency's interpretation of gaps and ambiguities in statutes it implements, so long as that interpretation was reasonable.
  - The Supreme Court held in *Chevron* v. *Natural Resources Defense Council* that courts should give deference to an administrative agency's interpretation of a statute it administers.
  - *Chevron* set out a two-step framework, where courts asked first if the statute was ambiguous, and then, if the statute was ambiguous, courts deferred to the agency's interpretation so long as it was "permissible."
- *Chevron* was a pillar of administrative law since 1984, although the Supreme Court had begun to signal that its foundation was cracking.

Mead

- *United States v. Mead Corp.*, 533 U.S. 218 (2001)
  - *Chevron* “Step Zero”
  - Congress can delegate authority by leaving gaps for the agency to fill
    - Notice and comment
    - Force of law
    - Clarify right and obligations

Leading up to *Loper Bright*

- *Kisor v. Wilkie*, 588 U.S. 558 (2019) narrows *Auer v. Robbins*, 519 U.S. 452 (1997).
  - If a regulation is genuinely ambiguous and the agency's analysis is entitled to weight, a court can defer to the agency's interpretation

- *West Virginia v. Environmental Protection Agency,* 597 U.S. 697 (2022)
  - Agency must have clear congressional authorization for rules that implicate "major questions"

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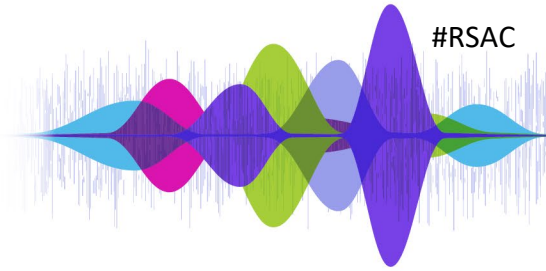
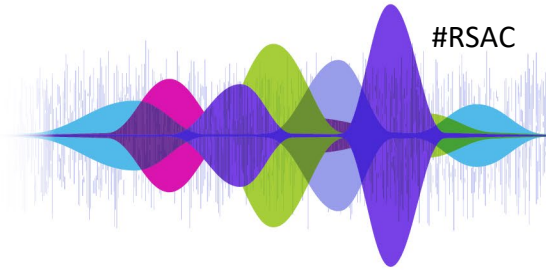
Loper and the New Legal Landscape

Loper Bright: the end of *Chevron* deference



- The Supreme Court overruled *Chevron* in *Loper Bright Enterprises v. Raimondo,* one of a pair of cases relating to the National Marine Fisheries Service's rules for commercial fishing companies.
- The Court held that federal courts must exercise independent judgment in deciding whether an agency has acted within its statutory authority.
  - The Court emphasized that Article III of the Constitution makes federal courts responsible for adjudicating disputes between parties, including by providing final interpretations of federal statutes.
  - Under *Loper Bright*, federal courts must "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."

Interaction with other doctrines



- Major questions doctrine (*West Virginia v. EPA*, 2022)
  - Agencies have limited power to regulate on issues of vast economic or political consequence without a clear statement of authority from Congress
- Non-delegation doctrine
  - Congress cannot confer overbroad, legislative-like authority to agencies
  - Must have limits and an intelligible principle on which to base regulations
- Bottom line:
  - Agency authority must be based on a delegation by Congress
  - Congress must be more specific about the scope of agency authority
  - Otherwise, the agency authority may be subject to court challenge

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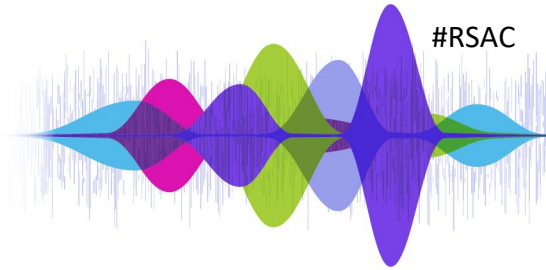
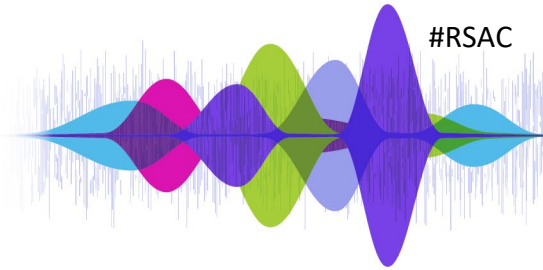
Assessing Regulatory Challenges

Moving Forward



- Rulemaking
  - Longer process, longer timeframes
  - Potentially less ambitious agendas
  - More explicit references to APA requirements
- Litigation
  - Courts are still navigating the changes
  - Potential uptick in enforcement actions (regulation by enforcement) or preemptive challenges

Evaluating Regulatory Challenges



- Statutory language
  - Scope of Congressional intent
- Agency regulation or enforcement
  - Outside the scope of legislative intent
- Standing
  - Injury

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How To Apply What You Have Learned Today

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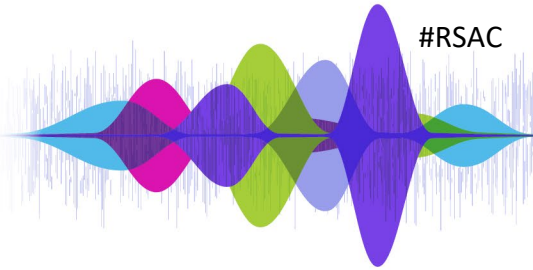
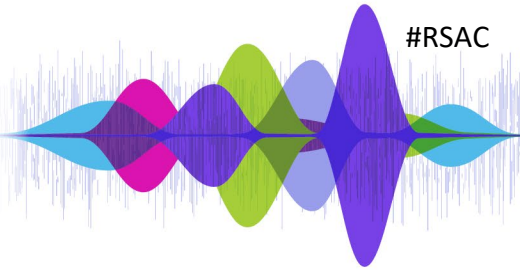
How To Apply What You Have Learned Today (I)



- Be cautious about challenges
  - Not every government action is now subject to challenge
  - Only affects federal regulations and enforcement
- Be aware of the other tools for federal regulatory policymaking
  - Agencies like the FTC and the CFPB have established cybersecurity standards through **enforcement actions**.
  - Federal agencies increasingly set cybersecurity standards through **contract**, including with respect to incident notifications and the security of software they procure.
  - Regulators, as well as non-regulatory agencies like NIST and CISA, also have set expectations for private sector cybersecurity through the issuance of **guidance** documents.
  - Financial regulators with supervisory authority also have set cybersecurity expectations in the confidential **supervision** process.

How To Apply What You Have Learned Today (II)



- Change will take time
  - No major compliance changes yet and Litigation will take time to move through the system
- Be aware of other sources of cybersecurity regulation
- State-level cybersecurity regulation
  - NY Department of Financial Services Cybersecurity Regulation
  - California Consumer Privacy Act
- International regulatory frameworks
  - Europe: General Data Protection Regulation, Cybersecurity Resilience Act, Digital Operational Resilience Act, Network and Information Security Directive 2.
  - China: Cybersecurity Law (CSL), Data Security Law (DSL), and Personal Information Protection Law (PIPL)
  - Brazil: General Data Protection Law (LGPD)

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Thank You